KEMENTERIAN PERTAHANAN MALAYSIA & ANOR

v.

MALAYSIA INTERNATIONAL SHIPPING CORPORATION BHD

HIGH COURT MALAYA, KUALA LUMPUR
VINCENT NG J
[CIVIL SUIT NO: D1-27-21-1995]
12 JANUARY 2003

CIVIL PROCEDURE: *Action - Dismissal of action - Pleadings - Absence of particulars regarding plaintiffs' cause of action - Representation - Whether law firm duly authorised to represent plaintiffs - Whether there were discrepancies in letter of subrogation - Whether claim to struck off*

The plaintiffs had ordered some equipment from GEC-Marconi which was to be shipped and unloaded at the North Port, Port Kelang and were insured by Perdana Signa Insurance Bhd ('the insurer'). During the unloading process, the equipment was damaged and the plaintiffs' submitted a claim to the insurer who paid the sum in question to GEC-Marconi. Subsequently, GEC-Marconi issued a letter of subrogation dated 21 March 1997 ('the said letter') to the insurer which in turn instituted an action against the defendants in the plaintiffs' name ('the first suit') based on the subrogation clause. The plaintiffs had also instituted another action against Kontena Nasional Bhd and Kelang Container Terminal ('the second suit') based on the same cause of action. Both actions were consolidated and it was agreed that the decision of this suit would bind the other.

The defendants applied to the senior assistant registrar to strike out the plaintiffs' action on the premise that the law firm purporting to represent the plaintiffs, *ie*, M/s Shook Lin & Bok, was not authorised to do so. The SAR however dismissed the application and hence this appeal. The issues before this court were whether: (i) the fact of subrogation must be pleaded in the pleadings; and (ii) a necessity arose regarding the appointment of the firm by the plaintiffs.

Held:

[1] It was common ground that the plaintiffs' suit was wholly based on the principle of subrogation but this point was not pleaded nor were there any particulars pertaining to subrogation adverted to in the statement of claim, and there was no evidence to prove that the firm had been duly appointed

by the Attorney-General's chambers to act for the second plaintiff. Thus, where a solicitor has not shown any authority to act for the party he purports to act, the suit filed by him must be struck out. (pp 523 g, 524 a & 525 b)

[2] The facts indicated that it was GEC-Marconi, rather than the plaintiffs, which had issued the said letter and which also received the payment under the policy. Thus, as GEC-Marconi was not an insured party, the said letter could not be considered as a proper letter of subrogation. Furthermore, no right of subrogation accrues to the insurers until they have paid under the policy. This fact, must be asserted in the pleadings. (p 525 e-g)

[3] The said letter was dated 21 May 1997 whereas the insurer had instituted the suit in the plaintiffs' name in 1995. This discrepancy seriously undermined the very foundation of the plaintiffs' suit as the action was premature. (p 526 a)

[Defendant's appeal regarding the first suit allowed with costs; plaintiffs' second suit dismissed.]

Case(s) referred to:

Bruce v. Odham Press Ltd [1936] 1 KP 697 ***(refd)***
City Tailors v. Evans [1921] 91 LJ KB 379 ***(refd)***
Commercial Union Assurance Co v. Lister [1874] 9 Ch App 483 ***(refd)***
Edwards v. Motor Union [1922] 2 KB 249 ***(refd)***
Employer' Liability Assurance Corpn v. Skipper and East [1887] 4 TLR 55 ***(refd)***
Esso Petroleum Co Ltd v. Hall Russel & Co Ltd [1988] 3 WLR 730 ***(refd)***
King v. Victoria Insurance Co [1896] AC 250 ***(refd)***
Page v. Scottish Insurance Corpn [1929] 140 LT 571 ***(refd)***
Philipps v. Philipps [1878] 4 QBD 139 ***(refd)***
Re Lee Siew Kow, decd [1951] MLJ 224 ***(refd)***
Re Miller Gibb & Co Ltd [1957] 2 All ER 266 ***(refd)***
Renofac Builder (M) Sdn Bhd v. Chase Perdana Bhd [2001] 5 CLJ 371 HC ***(refd)***
S & F International Ltd v. Trans-Con Engineering Sdn Bhd [1985] 2 CLJ 228; [1985] CLJ (Rep) 280 FC ***(refd)***
Syawal Enterprise Sdn Bhd & Anor v. Dayadiri Sdn Bhd [1990] 2 CLJ 297; [1990] 3 CLJ (Rep) 165 HC ***(refd)***
The Asia Life Assurance Society Ltd v. Chan Theng Kiang [1995] MLJU 380 ***(refd)***
UMBC v. Palm & Vegetable Oil (M) Sdn Bhd [1983] 1 MLJ 206 ***(refd)***
William Jacks (M) Sdn Bhd v. Chemquip (M) Sdn Bhd & Anor [1991] 2 CLJ 1309; [1991] 1 CLJ (Rep) 492 SC ***(refd)***
Yorkshire Insurance Co Ltd v. Nisbet Shipping Co Ltd [1961] 2 All ER 487 ***(refd)***

Legislation referred to:
Government Proceedings Act 1956, s. 24(3)
Rules of the High Court 1980, O. 6 r. 3

Marine Insurance Act 1906 [UK], s. 79

Other source(s) referred to:
Raol Colinvaux, *The Law of Insurance*, 4th edn, 1979

(Suit No: D1-27-21-95)
For the appellant/defendant - Danny Yap; M/s Lee Ong & Kandiah
For the respondents/plaintiffs - LL Lee; M/s Shook Lin & Bok

(Suit No: D1-21-1-1995)
For the 1st defendant - Kevin Wong; M/s Tommy Thomas
For the 2nd defendant - Karamjit Kaur; M/s H Karamjit & Co

Reported by M Maheswaran

JUDGMENT

Vincent Ng J:

Preamble

Before me is an appeal in civil suit no: D1-27-21-95 ('1st suit') by the defendant against the decision of the learned senior assistant registrar dated 16 February 2001, dismissing the defendant's application to strike out the plaintiffs' suit for the lack of authorisation of Messrs Shook Lin & Bok ('the firm') to represent the plaintiffs. It must be noted that the plaintiffs had also initiated another civil suit based on the same cause of action against Kelang Container Terminal Bhd and Kontena Nasional Bhd *vide* civil suit no: D1-21-1-95 ('2nd suit'). Both the actions were consolidated pursuant to a court order dated 9 February 1998.

Although it was only the defendant in the 1st suit who had filed an application challenging the authority of the firm to act for the plaintiffs, all parties agreed that the decision in this appeal would also bind the parties in the 2nd suit.

Background Facts

The plaintiffs were insured by Perdana Cigna Insurance Bhd (the insurer) under a Marine Open Policy against any loss or damage arising from all shippings and sendings on or after a specified date (exh. A encl. 16B).

To the order of the Secretary General of the 1st plaintiff, GEC-Marconi (Projects) Ltd of England loaded and shipped some equipment onboard the vessel M.V. 'Nedlloyd of Africa'. The plaintiffs alleged that during the course of unloading at North Port, Port Kelang, the equipment was damaged.

Subsequently, the plaintiffs submitted a claim to the insurer for Pound Sterling 176,987.00 for damages to their equipment. As directed by the plaintiffs, the insurer paid out the claim to GEC-Marconi Radar & Defence Systems, who in turn issued a letter of subrogation dated 21 May 1997 (exh. C encl. 16B).

Relying on the subrogation clause contained in the policy, the insurer then, at their own expense, instituted this action against the defendant, using the plaintiffs' names. In the present case there does not seem to be any formal or legal assignment of the legal chose in action to the insurers (the court is not privy to this) since the latter did not sue in their own name. See *Employers' Liability Assurance Corpn v. Skipper and East* [1887] 4 TLR 55 and *King v. Victoria Insurance Co* [1896] AC 250, PC. There are also instances of partial subrogation only, where the amount of loss exceeds the amount paid under the policy, in which case the assured may institute and conduct proceedings for the benefit of the insurers as well as of himself. See *Page v. Scottish Insurance Corpn* [1929] 140 LT 571 at 576 CA and *Commercial Union Assurance Co v. Lister* [1874] 9 Ch App 483.

The subrogation clause relied upon by the insurer reads as follows:

> Subrogation: The Assured shall, at the request of these Insurers or their agents, assign and subrogate to these Insurers at the time of payment and to an amount not exceeding the sum paid by these Insurers, all their rights and claims against others and **permit suit to be brought in the Assured's name** but at these Insurers' expenses … (emphasis added)

The Appeal

The crux of the issues before me can be gleaned from the written submission (encl. 34B) of counsel for the plaintiffs, to wit:

(i) since the plaintiffs' suit is based on the doctrine of subrogation, whether the fact of subrogation must be pleaded in the pleadings; and hence,

(ii) whether there was any necessity for the firm to be appointed by the plaintiffs.

At this juncture, I must observe that it was common ground that:

(a) although this suit was wholly based on the principle of subrogation, as asserted by the plaintiffs, this point was not pleaded nor was there any particulars pertaining to subrogation adverted to in the statement of claim; and

(b) aside from a letter issued by the federal counsel of the 1st plaintiff dated 7 June 1999 (exh. D encl. 16C), the firm failed to produce any letter from the Attorney-General's Chambers confirming that it had been duly appointed to act for the 2nd plaintiff, the Government of Malaysia.

The Decision

Section 24(3) of the Government Proceedings Act 1956 ('the Act') provides that:

> An advocate and solicitor of the High Court **duly retained by the Attorney-General in the case of civil proceedings by or against the Federal Government** or Federal officer, or by the Legal Adviser, or, in the case of the States of Sabah and Sarawak, by the State Attorney-General in the case of **civil proceedings by or against the Government of a State officer, may appear as advocate on behalf of such Government** or officer in such proceedings. (emphasis added)

If, as contended by the plaintiffs, the aforementioned section of the Act was inapplicable, as the action was based on the principle of subrogation, I would hold that the fact of subrogation is a material fact, based on the principles enunciated in *Bruce v. Odham Press Ltd* [1936] 1 KP 697, 712, [1936] 1 All ER 287, 294 CA. On the topic of 'material facts' I need do no more than to quote the pertinent *dicta* from three cases, expressed as follows: "The basic principle is that the pleading must contain 'a statement in a summary form for the material facts … but not the evidence by which they are to be proved'." – per Murray Aynsley CJ in *Re Lee Siew Kow, decd.* [1951] MLJ 224; "… the pleading, not to be embarrassing to the defendants, should state those facts which will put the defendants on their guard and tell them what they have to meet when the case comes on for trial." – per Cotton LJ in *Philipps v. Philipps* [1878] 4 QBD 139; and, "The word 'material' means necessary for the purpose of formulating a complete cause of action, and if any one 'material' statement is omitted, the statement of claim is bad." – per Scott LJ in *Bruce v. Odham Press Ltd* [1936] 1 KB 697 at p. 712; [1936] 1 All ER 287 at p. 194 CA. See also *Renofac Builder (M) Sdn Bhd v. Chase Perdana Bhd* [2001] 5 CLJ 371. It follows that, in the instant case, since it is a material fact, it has to be pleaded (see *The Asia Life Assurance Society Ltd v. Chan Theng Kiang* [1995] MLJU 380; *UMBC v. Palm & Vegetable Oil (M) Sdn Bhd* [1983] 1 MLJ 206, and *S&F International Ltd v. Trans-Con Engineering Sdn Bhd* [1985] 2 CLJ 228; [1985] CLJ (Rep) 280), and the failure so to plead is fatal to the suit, as it stood. Here it is pertinent to note that, until hitherto, the plaintiff has not applied to amend the statement of claim to reflect this fact.

By analogy (though inapplicable here), O. 6 r. 3 of the Rules of the High Court 1980 imposes a mandatory requirement that where the plaintiff sues in a representative capacity, the writ issued must be endorsed with a statement of the capacity in which he sues.

Since the basis of this suit was subrogation and it was not pleaded, making it appear as though it is a straightforward and normal proceeding between two opposing parties, it is trite that a solicitor who has not shown any authority to act for the party he purports to act (namely the Government of Malaysia here), the suit filed by him must be struck out (see *Syawal Enterprise Sdn Bhd & Anor v. Dayadiri Sdn Bhd* [1990] 2 CLJ 297; [1990] 3 CLJ (Rep) 165 and *William Jacks (M) Sdn Bhd v. Chemquip (M) Sdn Bhd & Anor* [1991] 2 CLJ 1309; [1991] 1 CLJ (Rep) 492).

I am keenly conscious of trite law that a third party who is being sued by an insurer legitimately exercising his right of subrogation has no right to challenge a settlement entered into between the insurer and an insured. See *King v. Victoria Insurance Co* [1896] AC 250; s. 79 Marine Insurance Act 1906; *Esso Petroleum Co Ltd v. Hall Russel & Co Ltd* [1988] 3 WLR 730 at p. 746; and *Yorkshire Insurance Co Ltd v. Nisbet Shipping Co. Ltd* [1961] 2 All ER 487. The law notwithstanding, if indeed the plaintiffs' action was based on the doctrine of subrogation, a careful perusal of the letter of subrogation dated 21 May 1997 (exh. C encl. 16B) showed that it was GEC-Marconi Radar & Defence Systems, rather than the plaintiffs, who issued the alleged letter of subrogation and who also received payment under the policy. Thus, as GEC-Marconi Radar was not an insured party the said letter dated 21 May 1997 is, in my view, not a proper letter of subrogation. See *Re Miller Gibb & Co Ltd* [1957] 2 All ER 266. Furthermore, no right of subrogation accrues to the insurers until they have paid under the policy and, in my view, this fact must be asserted in the pleadings. See *City Tailors v. Evans* [1921] 91 LJ KB 379, 385, and *Edwards v. Motor Union* [1922] 2 KB 249, 254, 255. And, unless they have paid before issue of the writ the fact that they have paid before the trial of the action in which they claim to be subrogated will not avail them. See *Page v. Scottish Insurance* [1929] 98 LJ KB 308. See *The Law of Insurance* by Raol Colinvaux (4th edn. – 1979) (Sweet & Maxwell Ltd). Unfortunately, in the present action, as it appears to be the contention that neither the court nor the defendants need to know from the pleadings the alleged subrogation basis of the action, the fact whether the insured or GEC-Marconi Ltd was paid before issue of the writ was not pleaded.

Aside from this, the said letter, giving the insurer the alleged right to sue in the plaintiffs' name, was dated 21 May 1997 whereas the suit by the Insurer in the plaintiffs' names was instituted in 1995. The discrepancy in the dates seriously undermined the very foundation of the plaintiffs' suit as the action was premature.

Notwithstanding the above, there is the eventual question of the costs of this suit. Costs are normally awarded against the party or parties on record. This being so, should the costs in this suit be ordered against the Government of Malaysia without their participation in the proceedings through unequivocal authorization to act on their behalf, it would work injustice on them in the event the indemnity on costs (if any) turns out to be unenforceable.

Conclusion

After having studied the pleadings, affidavits and written submissions from both sides and based on the aforesaid reasons, I allow the defendant's appeal with costs and order that the plaintiffs' suit D1-27-21-95 be struck out. Consequently, as agreed earlier, suit D1-21-1-95 is accordingly stuck out with no order as to costs.